Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

ALECIO RANDLE,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the state courts' decision dismissing Randle's Rule 32 Petition and affirming his conviction violates Randle's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution

2. Whether the state courts' decision dismissing Randle's Rule 32 Petition and affirming his conviction violates Randle's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution

3. Whether the state courts' decision dismissing Randle's Rule 32 Petition and affirming his conviction violates Randle's right to equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution

4. Whether the state courts' decision dismissing Randle's Rule 32 Petition and affirming his conviction violates his right to a fair and impartial trial, as guaranteed by the Sixth Amendment to the United States Constitution

5. Whether the trial court's "sequential jury instruction" which deprived Randle of his defense of self defense constitutes an issue of first impression

LIST OF PARTIES

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Respondent: State of Alabama

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BASIS FOR JURISDICTION

The date of entry of the Alabama Supreme Court Judgment sought to be reviewed is the 21st day of May, 2002. Accordingly, pursuant to *Rule 13, 1. of the Supreme Court Rules*, this petition is timely filed on this date.

Petitioner further contends that this Honorable Court has jurisdiction to review his Petition for Writ of Certiorari pursuant to Rule *10(b) and 10 (c)* of the Supreme Court Rules.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The *Fifth Amendment to the United States Constitution,* which provides, in pertinent part: "No person shall ... be deprived oflife, liberty, or property, without due process of law."

The *Sixth Amendment to the United States Constitution,*, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the assistance of counsel for his defense."

The *Fourteenth Amendment to the United States Constitution,* which provides, in pertinent part: "... "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 32.1(a) of the Alabama Rules of Criminal Procedure,, which includes in the "Scope of remedy": "The constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief.

Rule 32.1(f) of the Alabama Rules of Criminal Procedure,, which includes in the "Scope of remedy": "The petitioner failed to appeal within the prescribed time and that failure was without fault on the petitioner's part."

Rule 32.2(d) of the Alabama Rules of Criminal Procedure, which states: "CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. Any claim that counsel was ineffective must be raise as soon as practicable, either at trial, on direct appeal; or in the first Rule 32 petition, whichever is applicable..."

RlUe 32.6(b) of the Alabama Rules of Criminal Procedure which states:

"SPECIFICITY. The petition must contain a clear and specific statement of the ground supon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

Rule 32.7(d) of the Alabama Rules of Criminal Procedure, which states:

"SUMMARY DISPOSITION. If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court' shall direct that the proceedings continue and set a date for hearing.

STATEMENT OF THE CASE

This is a request for review of the Alabama Supreme Court's May 21, 2004 denial of Petitioner's Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals, App. A; a request for review of the Alabama Court of Criminal Appeals Memorandum Opinion, App. B; and a request for review of the trial court's summary dismissal of Randle's Rule 32 Petition. Excerpts at App. D A background of the case follows.

BACKGROUND:

Petitioner, Alecio M. Randle (Black) was charged with and convicted of the capital murder of three white men (a father and two sons) in a shooting incident in which the following occurred:

Following a verbal confrontation between one of the sons and an unidentified black male in a completely different location, the aforesaid victims, without provocation and while

armed with [1]deadly weapons walked and drove the distance of three blocks to Randle's residential area. Upon seeing Randle and his co-defendant, Kenneth Allison (also black) outside their apartment, the victims approached them. One of the sons was wielding a large chair rail, the other was wielding a 2x4 with a large nail protruding therefrom. The father was bent over and appeared to be hiding something in his waist. The victims were also making verbal threats. Someone shouted that one of the victims had a gun and Randle and Allison reacted thereto by running through a back alley behind their apartment, then running back around the front of their apartment complex until they were able to run inside the apartment. The two sons chased after them while wielding the chair rail and a 2x4.

After Randle and Allison had retreated into their apartment, the victims then starting advancing towards the

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[1] The deadly weapons consisted of a knife, a box-cutter, a chair rail and a 2 x 4 with a long nail protruding therefrom.

front door of the apartment. Randle eventually went to the door armed with a gun and repeatedly asked them to stop; however, the victims continued to advance. Finally, out of concern for the safety of his pregnant common law wife, his unborn child, his infant son, his friend, Allison, and himself--all of whom were inside the apartment, and in consideration of their inability to retreat further in that the apartment only had one entrance and exit, the front door towards which the victims were approaching, Randle walked to the door and fired several warning shots while continuing to ask the victims to stop their advancement. The victims continued to advance, and Randle went outside. One of the sons swung the 2x4 at Randle, and Randle shot the father, whom he perceived to be the greatest threat because he believed that he was hiding a gun in his waist since he was bent over and appeared to be reaching for something in his midsection, and since someone had previously shouted a warning that victims had a gun. The other victims continued to advance. Randle fired

another shot, which struck one of the sons. Randle continued to shoot and two of the shots struck the other son. All of the victims died from their gunshot wounds.

The foregoing incident occurred on McVay Street, and the trial started on the date of Timothy McVeigh's execution.

Randle and [2]Allison were each charged with three counts of capital murder. Randle was convicted of capital murder on June 18, 2001 and sentenced to imprisonment for life without parole. C 2 Said conviction and sentence were appealed under Appellate Case Number [3]CR-00-2278. On January 25, 2002, the Alabama Court of Criminal Appeals affirmed the trial court's decision; and on May 17, 2003. the Alabama Supreme Court denied his Petition for Writ of Certiorari Record C 3

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[2] Allison was represented by the undersigned counsel. After 16 months in jail awaiting trial, the capital murder charges against him were nolle prosequi.

[3] This Court of Criminal Appeals entered its Order on November 17, 2003 granting Randle's motion to take Judicial Notice of this prior appellate record in his Rule 32 Appeal.

Randle's conviction was appealed by his trial counsel, and accordingly, did not include any issues concerning ineffective assistance of trial. Additionally, Trial/Appellate Counsel raised only two issues on appeal, neither of which was raised in his Rule 32 Petition, nor herein.

RANDALL'S RULE 32 PETITION

On May 19, 2003, Randle timely filed his Petition for Relief from Conviction or Sentence, and requested a hearing thereon. Record 2-43, Excerpts quoted in App. D On August 5, 2003, the trial court entered its Order summarily denying and dismissing Randle's Rule 32 Petition without a hearing. Record 71-72 Randle timely filed his appeal of the aforesaid Order on September 11, 2003. Record 74-77 Randle subsequently filed a Motion for the Alabama Court of Criminal Appeals to take Judicial Notice of the Appellate Record on his conviction and appeal styled as CR-00-2278; and said motion was granted on November 17, 2003. Record Suppl. 12, 13

Randle also filed a Motion to Supplement Record by adding thereto his post-judgment Motion to Reinstate Rule 32 Petition and Motion for Evidentiary Hearing. Suppl. Record 10-11 Said Motion was granted on November 17, 2003. Record Suppl. 12 Randle's Motion to Reinstate Rule 32 Petition ... was added to the instant appellate record. Record Suppl. 2-9

On February 20, 2004, the Alabama Court of Criminal Appeals affirmed the trial court's summary dismissal of Randle's Rule 32 Petition. App. C The Memorandum Opinion contained its summary of Randle's Rule 32 Petition in eight claims, and affirmed the trial court's denial and dismissal of Randle's Rule 32 Petition. App. C 2, C 3 This appellate court disposed of Randle's claims of state and federal violations by ruling as follows: "Claims 2, 3, 4, 5, App. and 6 were precluded because Randle could have raised them at trial and on appeal, but did not" and that "Claims 1 and 7, consisted of bare allegations that the appellant did not adequately support... did not satisfy his burden of pleading.... "

Randle filed an Application for Rehearing, which was overruled. App. B Thereafter Randle filed a Petition for Writ of Certiorari to the Alabama Supreme Court, which was denied on May 21, 2004. App. A

Randle's federal questions concerning the denial of his constitutional rights to due process, equal protection, a fair and impartial trial and effective assistance of counsel sought to be reviewed were raised in the state trial and appellate courts, as evident in his Rule 32 Petition excerpts at Appendix D; his Rule 32 Petition, Record C 2-43; and his appellate briefs. App. D 1-12 Further, the State acknowledged the aforesaid federal claims in the prosecutor's response to Randle's Rule 32 Petition, App. D 13-14; and in the appellate court's summarization thereof, App. C 2, C 3

ARGUMENT

I. THE APPELLATE COURT'S' RULINGS AND AFFIRMATION OF THE TRIAL COURT'S SUMMARY DISMISSAL OF RANDLE'S RULE 32 PETITION CONFLICTS WITH ALABAMA STATUTORY AND CASE LAW ON THE SAME POINTS OF LAW, AND WITH FEDERAL LAW.

In its opinion, the appellate court citing *Ala. R. Crim. P., Rule 32.2(a)(3) and (5)* held that: "Claims 2, 3, 4, 5, and 6 were precluded because Randle could have raised them at trial and on appeal, but did not". App. C 2, C3

However, in the cases of *Cotton v. State, 712 So. 2d 1109 (Ala. Crim. App. 1977 and Battle v. State, 801 So. 2d 41 (Ala. Crim. App. 2001,* and in numerous other cases, the state appellate court carved out an exception which barred the preclusion of the aforesaid claims of ineffective assistance of counsel when both the trial and appellate counsel are the same, as in the instant case. Said exception is also recognized in the *Ala. R. Crim. P., Rule 32.2(d),* which expressly permits the raising of all of Randle's claims of ineffective assistance of counsel for the first time in his Rule

32 Petition. Accordingly, Randle's claims 2, 3, 4, 5, and 6 are not precluded as they are included in his Rule 32 Petition as part of his ineffective assistance of counsel claims. C 11-24, C 27-29, C 33-38

In it opinion, the appellate court held that: "Because Claims 1 and 7 ... consisted of bare allegations that the appellant did not adequately support, he did not satisfy his burden of pleading pursuant to *Rules 32.3 and 32.6(b), Ala. R. Crim. P.*, regarding those claims." Quite the contrary. Randle asserts that his specific averments at Record: C 11-24, C 27-29, and C 33-40, [excerpts thereof are provided at App. C] met the pleading specificity requirements of Rule 32.3 and 32.6(b), and that the appellate court's finding to the contrary is clearly erroneous.

Additionally, Rule 32.6(b) mandates that: "The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a

constitutional right has been violated and bare conclusions of law will not be sufficient to warrant any further proceedings." In the case of *Waddle v. State, 784 So. 2d 367 (Ala. Crim. App. 2000)*, the appellate court held that Petitioner's Rule 32 Petition was properly dismissed by the circuit court since the Petitioner therein did not allege any specific acts or omissions on the part of his counsel that constituted deficient performance. Randle alleged numerous specific acts and omissions in this Rule 32 Petition.

Additionally, Alabama case law has considered whether the Rule 32 Petition form is meritorious on its face in deciding whether the petition met the specificity requirement. *Johnson v. State, 555 So. 2d 216 (Ala. 1989); Henderson v. State, 586 (So. 2d 1009 (Ala. Crim. App. 1991)* Randle further asserts that he meticulously completed the form, and that his claims are meritorious on their face. Further, in *Boyd v. State, 2003 Ala. Crim. App. LEXIS 265*, the appellate court held: "An evidentiary hearing on an Ala. R. Crim. P. 32 petition is

required only if the petition is 'meritorious on its fact.' A petition is "meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true."

In the instant case, Randle presented a clear and specific statement of the grounds upon which he sought relief; and a full disclosure of the facts he relied upon, which were sufficient to show that he is entitled to relief if said facts are true. Randle stated facts; named persons and outlined their offensive conduct or actions; he described circumstances surrounding his claims; and he identified the source and the nature of newly discovered evidence. C 11-24. C 27-29, and C 33-40 Additionally, the trial court had before it the prior appellate record in CR-00-2278, which contained the very facts presented by Appellant in his Rule 32 Petition. Randle further asserts that his claims are meritorious on their face.

Additionally, in *Ray v. State, 2002, Ala. Crim. App. Lexis 244,* the appellate court ruled that the trial court is required to make specific findings of facts as to each claim of ineffective assistance of counsel in order to afford petitioner due process; and in *Rivas v. State, 709 So. 2d 204 (Ala. Crim. App. 1997,* the appellate court ruled that the trial court must make specific findings as-to the issues in the Rule 32 Petition which it finds to be the subject of summary dismissal. The absence of the appellate court's specific findings on the aforesaid Rule 32 issues concerning ineffective assistance of counsel in the instant case, violates this prior ruling.

In its opinion, the appellate court, citing *Sumlin v. State, 710 So. 2d 941 (Ala. Crim. App. 1998),* held that: "We will affirm a circuit court's denial of a Rule 32 petition if it is correct for any reason."

The aforesaid case law in *Sumlin, supra.,* and in other Alabama case law, is clearly based upon jurisdictional and statute of limitations issues which result in the disposition of the entire case; however, such generally dispositive issues are

not present in the instant case.

Moreover, the case law in *Smith v. State, 581 So. 2d 1283, 1284 (Ala. Crim. App. 1991), Whitaker v. State, 686 So. 2d 1262 (Ala. Crim. App. 1997), Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985)* held that when a petition contains matters which, if true, would entitle the petitioner to relief, an evidentiary hearing must be held. In the instant case, Randle's eight claims as summarized by the appellate court in its Memorandum Opinion asserted matters which, if true, would entitle him to relief; accordingly, an evidentiary hearing must be held. Further, none of the state courts have ruled that Randle's claims are untrue, and in fact, such ruling would be contrary to the appellate records cited herein.

In its opinion, the appellate court, citing *Randle v. State, (CR-00-2278, January 24 2002) -- So. 2d -- (Alabama Crim. App. 2002) and Ala. R. Crim. P., Rule 32.2(a)(2) and (4),* held that: "Additionally, some of his claims regarding the State's late disclosure of evidence were raised and addressed at trial and on direct appeal. Therefore, those claims were

precluded pursuant to Rule 32.2(a)(2) and (4), Ala. R. Crim. P." The appellate court does not identify which of the aforesaid claims are precluded. In the case of *Whitt v. State, 733 So.2d 463 (Ala. Crim. App. 1998)*, the appellate court held that it could not recognize factual assertions that are not disclosed or supported by the record and that it was bound by the record. Further, in *Williams v. State, 412 So.2d 1274 (Ala. Cr. App. 1982)*, this court ruled that it may not presume any facts not shown by that record.

In its opinion, the appellate court held that: "[T]he appellant argues that the State's response to his petition did not provide the type of notice necessary to satisfy the requirements of due process. However, the State's response and amended response adequately set forth the procedural grounds upon which it relied and addressed the merits of the appellant's petition. Therefore, his argument is without merit."

However, in the case of *Coleman v. State, 571 So. 2d 1289 (Ala. Crim. App. 1990)*, the appellate court held that the

State is required to plead the ground or grounds of preclusion that it believes apply to the petitioner's case using specific factual bases therefor, in that a general allegation that merely refers the petitioner and the trial court to a rule does not provide the type of notice necessary to satisfy the requirements of due process and does not meet the burden of pleading assigned to this Rule.

The record clearly shows that the State failed to plead its grounds of preclusion with specificity, and merely cited the rule of preclusion in most instances. Likewise, the Court's Order does not contain specific findings as to the issues in his petition which it found to be subject to summary dismissal, as required by *Rivas v. State, 709 So. 2d 204 (Ala. Crim. App. 1997)* and *Rule 32.9*. Additionally, Alabama law requires the trial court to make specific findings of facts as to each claim of ineffective assistance of counsel in order to afford petitioner due process. *Ray v. State, 2002, Ala. Crim. App., Lexis 244* No such specific findings of facts were stated in this Court's Order dismissing and denying his petition.

Randle further asserts that this Court did not address all of his grounds in its ruling, to wit: Rule 32.1(a) The constitution of the United States or of the State of Alabama requires a new trial, or a reversal because he was denied equal protection, due process, and a fair and impartial trial by the State's suppression of evidence and failure to provide critical exculpatory evidence; by the jury instruction which contained a sequential order for consideration of possible verdicts with Randle's defense of self-defense being listed last thereby causing the jury not to consider said defense throughout its deliberation, and indeed during its first deliberation which led to the guilty verdict; by the verdict form which did not permit the jury to render a verdict on his claim of self defense, nor to unanimously decide on which of the two victims it contended that he intentionally killed, as mandated by the trial court in its instructions. Accordingly, this Court committed reversible error in summarily dismissing the same. *Bell v. State, 2002 Ala. Crim. App. Lexis 98*

Further, the State failed to deny many of the aforesaid grounds, to include: the jury sequential charge, the verdict forms, the prejudicial comments comparing Randle to McVeigh in a shooting incident on McVay street on the date of McVeigh's execution. Because the record does not show the State's response to the foregoing, the unrefuted facts set out by the petitioner must be taken as true, *Teat v. State, 589 So. 2d 815 (Ala. Crim. App. 1989)*, and "When a petition contains matters which, if true, would entitle the petitioner to relief, an evidentiary hearing must be held. *Smith v. State, 581 So. 2d 1283, 1284 (Ala. Crim App. 1991). Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985)* Randle hereby asserts that his petition contains such matters, as evident in the court record and transcript outlined hereinabove.

Pursuant to *Rule 32.7(d)*, "If the Court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further

proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing." In the instant case, this Court did not rule that no purpose would be served by any further proceedings, and this Court did not freely give Randle leave to file an amended petition. To the contrary, this Court dismissed his Petition within four days after the State filed its Amended Petition and prior to his receipt by mail of said pleading. Further, this Honorable Court included as an alternative ground for its denial and dismissal of his petition that his "petition is without merit." Said finding exceeds the permissible findings for summary disposition in Rule 32.7(d).

Randle asserts that trial and state court rulings were so fundamentally unfair that they deprived him of his rights to due process, equal protection, a fair and impartial trial and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution.

II. THE STATE COURTS' RULINGS VIOLATES RANDLE'S CONSTITUTION RIGHT TO DUE PROCESS, EQUAL PROTECTION, A FAIR AND IMPARTIAL JURY AND EFFECTIVE ASSISTANCE OF COUNSEL.

Randle was tried by a racially biased jury, two of whom admitted to referring to blacks by using the "N-word" C 304; only two of his jurors were black, although Randle is black and the three victims were white R 397, 417, 419; only 7 of the 60 potential jurors were black and 9 of the 60 white jurors admitted to using the "N-word" R 48-49, C 304; the police officers and other investigative officials took statements only from the white witnesses C 125, 129, 134; and Randle parents were removed from sitting behind him, while the victims family members were permitted to sit with them. R 53, 421 These issues were raised in Randle's Rule 32 Petition at C 12-13, 31-22, 25-27 Although Trial/Appellate counsel objected to the jury venire, the trial court deferred its ruling thereon, and counsel failed to obtain a subsequent ruling thereon. Further, he failed to object to, or to appeal any of the aforesaid issues. C 25-26 Said failures further violated

Randle's constitutional rights to equal protection, as guaranteed by the Fourteenth Amendment; to a fair and impartial trial, as guaranteed by the *Sixth Amendment to the United States Constitution;* and to effective assistance of counsel, as guaranteed by the *Sixth Amendment to the United States Constitution.* Further, counsel's actions and inactions failed to meet the standards for effective assistance of counsel as set forth in *Strickland v. Washington, 466 U.S.668; 104 S.Ct. 2052 80 L. Ed.2d 674 (1984).*

The State knowingly and intentionally suppressed evidence and/or failed to timely produce evidence, thereby depriving Randle of due process. to wit: The existence of statements by Randle were denied and suppressed by the State and then presented at trial. In fact, the trial court asked if there were a statement and the prosecutor responded "No, sir" thereby causing Trial/Appellate counsel not to file a motion to suppress. C 97 Thereafter, the State produced testimony at trial that Randle grabbed the gun and made an incriminating and prejudicial statement. R 425

Additionally, the trial court asked the State if it intended to present any ballistic testimony so it could determine whether the Defense would need to analyze it, and the State said there was none. C 97 However, the State produced significant ballistic evidence at trial. R 562, 568

The State produced discovery, to include photographs and witness statements on June 8, 2001 and on June 11, 2001, the first day of trial, which it had provided to the undersigned counsel for the co-defendant on September 13, 2000. Exhibit 1 to Rule 32 Petition at C 43

Trial/Appellate counsel failed to object to the admission of the aforesaid testimony and evidence, or to move to suppress or strike the same, thereby denying Randle a fair and impartial trial and effective assistance of counsel and due process, as guaranteed by the *Fifth and Sixth Amendments to the United States Constitution; Rule 16 of the Alabama Rule of Criminal Procedures, Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and Giles v. Maryland, 386 U.S. 66, 87 D. Ct. 793, 17 L. Ed. 2d 737 (1967); and Williams v.*

Dutton, 400 Fed. 2d 797 (5th Cir. 1968) Further, counsel's actions and inactions failed to meet the standards for effective assistance of counsel as set forth in *Strickland v. Washington, 466 U.S.668; 104 S.Ct. 2052 80 L. Ed.2d 674 (1984).*

The Prosecutor misrepresented the evidence. He told the jurors without objection by Trial/Appellate Counsel that two of the victims had no weapons, when the evidence showed that all of the victims were armed, and the chair rail and 2x4 were admitted into evidence as Exhibits 60 and 61. R 424, 603, C 38, 122 A large protruding nail was removed from the 2 x 4 wielded by one of the victims prior to it being presented to the jury. R 428, C 38, 78 The prosecutor falsely portrayed Randle as the aggressor, when in fact the three victims walked and/or drove three blocks carrying deadly weapons and chased and "went after" Randle and Allison in an unprovoked attack because they were black, and one of the victims had previously had a verbal confrontation with another black male. R 424 Trial/Appellate counsel failed to object to this material alteration of critical evidence.

The trial court gave a sequential jury instruction, to wit:

> If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of the offense of intentional murder of two or more persons as charged, then you shall find the defendant guilty of capital murder...
>
> If you check the first box that says guilty of capital murder as alleged in the indictment, that would end your deliberations and you would not deliberate further. R 1092, 1093

The full text of the Jury Instruction is provided at App. E.

This Jury Instruction deprived Randle of his defense of self defense as the jury deliberated and decided that he was guilty of capital murder, and stopped there as the trial court had instructed, without ever reaching the last step in the sequence, which would have permitted them to consider his claim of self defense. Record R 116 Said instruction severely prejudiced Randle in his defense, and proximately caused him to be convicted of capital murder and sentenced to life without parole.

Additionally, the trial court gave the jurors defective verdict forms which contained no place for the jurors to state their ruling on Randle's claim of self defense. Record C 27-30 Additionally, the trial court failed to ascertain from the jurors if they unanimously found that Randle intentionally killed the same two alleged victims pursuant to one scheme or course of conduct, pursuant to his instruction. R 1091 The aforesaid failures of the trial court severely prejudiced Randle in his defense and proximately caused his conviction and sentence. Trial/Appellate counsel did not object to the verdict forms, nor the deficient polling of the jury, thereby denying Randle a fair and impartial trial and effective assistance of counsel, as guaranteed by the *Sixth Amendment to the United States Constitution.*

The prosecutor compared Randle to Timothy McVeigh, who had been executed that morning for his role in the Oklahoma Bombing case to wit:

> Is there anyone on the panel who - of course, everyone is aware of the Timothy McVeigh Execution that took place this morning. In

> that case, 168 folks standing out there doing their job, kids in day-care. I think they were called collateral damage. Is there anyone on this jury panel who was opposed to the death penalty being imposed this morning?
>
> What if you just had three people that had been killed? Would that make a difference? Does that make you stop and think, well, hey, it's just three people, maybe we shouldn't impose the death penalty? R 280

The incident underlying the capital murder charge occurred on McVay Street. Such comparison was highly inflammatory and prejudicial to Randle. Moreover, the holding of this trial on the known date of the public execution of Timothy McVeigh was highly prejudicial to Randle. Such comparison of Randle with the United States most notorious internal terrorist, and with a man who indiscriminately murdered 168 men, women and children, was highly inflammatory and prejudicial. Nonetheless, Trial/Appellate counsel failed to object to the same, or to move to strike, or to move for a mistrial, thereby denying Randle a fair and impartial trial and effective assistance of counsel as guaranteed by the *Sixth Amendment to the U.S. Constitution.*

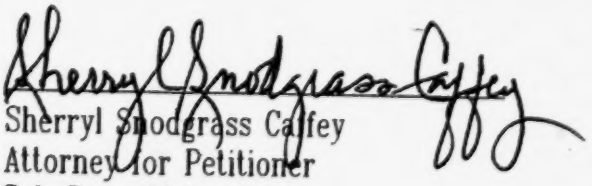
Newly discovered evidence exists, which was not available to Randle at trial, or which trial counsel failed to produce: His co-defendant, Kenneth Allison has been exonerated and is now available to testify. Corey Brown would testified that Randle started shooting at the victims only after one of the guys reached into his pants under his shirt and pulled something out, which appeared to be a gun to him; and that he witnessed white guys chasing black guys with bats, 2 X 4 and table leg and saw Randle shoot over the heads of the white guys as they were approaching him with their weapons. Mr. Brown would also testify that one of the victims said to tell the black guys that daddy has a gun and he is going to use it. Mernell Sanderfer also stated that he told Investigators that it was self defense, but he was not called as a witness.

Randle's Rule 32 Petition clearly shows that there is reasonable probability that, but for a racially biased jury, the errors in the jury instructions and verdict forms, prosecutorial misconduct, to wit: suppressed and misrepresented evidence and inflammatory statements, and

counsel's deficient actions with regards to the same, the result of Randle's trial would have been different. This Honorable Court has previously held that the standard of review for an ineffective assistance of counsel claim is whether counsel's performance was deficient, and whether the deficient performance prejudiced the defense. *Strickland v. Washington, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674; (1984)*

Accordingly, based upon all of the foregoing and Randle's court records, to include his conviction on capital murder and sentence of life without parole, Randle will continue to be deprived of his constitutional rights and "Equal Justice Under the Law" unless this Petition for Writ of Certiorari is granted.

Respectfully submitted



Sherryl Snodgrass Caffey
Attorney for Petitioner
P.O. Box 1327
Normal, Alabama 35801
(256) 551-0333

[Appellate Record cites herein appear as stated in the State Appellate Record: C (Court Record) and R (Transcript]

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APPENDIX D:	RULE 32 PETITION EXCERPTS
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APPENDIX "A"

IN THE SUPREME COURT OF ALABAMA

May 21, 2004

1030989

Ex parte Alecio M. Randle. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alecio M. Randle v. State of Alabama) (Madison Circuit Court: CC01-736.60; Criminal Appeals : CR-02-2228).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COST TAXED TO PETITIONER.

Writ Denied - No Opinion

STUART, J. - Houston, See, Lyons, Brown, Harwood, and Woodall, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of theSupreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 21st day of May, 2004

"S/Robert G. Esdale, Sr., Clerk"
Supreme Court of Alabama

APPENDIX "B"

Court of Criminal Appeals
SATE OF ALABAMA

Lane W. Mann
Clerk

P.O. Box 301555
Montgomery, AL 36130
Wanda K. Ivey
(334) 242-4590
Fax (334) 242-4689

Assistant Clerk

March 12, 2004

CR-02-2228

Alecio M. Randle v. State of Alabama (Appeal from Madison Circuit Court: CC01-736.60).

NOTICE

You are hereby notified that on March 12, 2004 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

"S/Lane W. Mann, Clerk"
Court of Criminal Appeals

cc: Hon. Jane Smith, Circuit Clerk
Sherryl Snodgrass Caffey, Attorney
J. Thomas Leverette, Asst. Atty. Gen.

APPENDIX "C"

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala. R. App. P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals
Sate of Alabama
Judicial Building, 300 Dexter Avenue
P.O. Box 301555
Montgomery, AL 36130-1555

RELEASED
FEB 20 2004
CLERK
ALA COURT CRIMINAL APPEALS

H.W."Bucky" McMillan
Presiding Judge

SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges

Lane W. Mann
Clerk
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MEMORANDUM

CR-02-2228

Madison Circuit Court
CC-01-736.60

Alecio M. Randle v. State of Alabama

Baschab, Judge.

On or about June 18, 2001, the appellant was convicted of capital murder for the murder of two or more persons by one act or pursuant to one scheme or course of conduct. The trial court sentenced him to imprisonment for life without the possibility of parole. We affirmed his conviction in an unpublished memorandum and issued a certificate of judgment on May 17, 2002. See Randle v. State, (CR-00-2278, January 25, 2002) ___ So.2d __ (Ala. Crim. App. 2002) (table). On May 19, 2003, the appellant filed a Rule 32 petition, challenging his conviction. After the State responded, the circuit court summarily denied the petition. This appeal followed.

The appellant argues that the circuit court erroneously denied his petition without first conducting an evidentiary hearing and without making specific findings of fact. In his petition, he contended that he was entitled to post-conviction relief because:

1) his trial and appellate attorneys rendered ineffective assistance;

2) he was denied his right to equal protection and an impartial trial;

3) the State suppresses evidence, misrepresented evidence, or did not provide critical exculpatory evidence;

4) the prosecutor made inflammatory and/or untrue comments during the course of the trial;

5) the trial court's instruction on the order in which the jury should have considered the possible verdicts and his self-defense claim denied him a fair and impartial trial;

6) the verdict forms did not permit the jury to return a verdict on his claim of self-defense or to decide unanimously which two of the victims it found that he had intended to kill;

7) newly discovered evidence exists that entitles him to a new trial; and

8) he did not appeal through no fault of his own.

Claims 2,3,4,5 and 6 were precluded because he could have raised them at trial and on appeal, but did not. See Rule 32.2 (a) (3) and (5), Ala. R. Crim. P. Additionally, some of his claims regarding the State's late disclosure of evidence were raised and addressed at trial and on direct appeal. See Randle, supra. Therefore, those claims were precluded pursuant to Rule 32.2 (a) (2) and (4), Ala. R. Crim. P. Because Claims 1 and 7 consisted of bare allegations that the appellant did not adequately support, he did not satisfy his burden of pleading pursuant to Rules 32.3 and 32.6 (b), Ala. R. Crim. P., regarding those claims. With regard to Claim 8, although the appellant raised this issue pursuant to Rule 32.1 (f), Ala. R. Crim. P., he does not argue that he did not appeal his conviction. Rather, he argues that it was through no fault of his own that he did not raise certain claims on direct appeal. However, this is not a valid ground for relief pursuant to Rule 32.1 (f), Ala. R. Crim. P.

Because the appellant's claims were precluded, not sufficiently pled, or did not state a ground for relief, the circuit court properly summarily denied his petition. See Rule 32.7 (d), Ala. R. Crim. P. We will affirm a circuit court's denial of a Rule 32 petition if it is correct for any reason. See Sumlin v. State, 710 So. 2d 941 (Ala. Crim. App. 1998). Further, a circuit court need not make specific findings of fact when it summarily denies a petition. See Fincher v. State, 724 So. 2d 87 (Ala. Crim. App. 1998). Therefore, the appellant's argument is without merit.

II.

The appellant also argues that the circuit court erred when it ordered the State to respond to his petition. Specifically, he contends that the order was an ex parte communication and that, if the State had not responded, the circuit court would have been

required to accept his unrefuted allegations as true. Contrary to the appellant's argument, the circuit court's order did not constitute an ex parte communication. Additionally, the record indicates that a copy of the order was sent to the appellant. Finally, the appellant has not shown that he was prejudiced by the circuit court ordering the State to file a response in accordance with Rule 32.7 (a), Ala. R. Crim. P. Therefore, his argument is without merit.

III.

The appellant further argues that the circuit court erroneously considered the State's response and amended response because they were not timely filed. However, Rule 32.7 (a), Ala. R. Crim. P., provides that the State shall file a response "[w]ithin thirty (30) days after the service of the petition, or within the time otherwise specified by the court." (Emphasis added.) Also, the circuit court implicitly extends the time period for filing a response when it accepts the State's untimely response. See Owens v. State, 659 So. 2d 977 (Ala. Crim. App. 1994). As the appellant concedes in his brief, the circuit court accepted the State's response to his petition. Finally, he has not shown that he was prejudiced by the State's delay in filing a response. ID. Therefore, his argument is without merit.

IV.

Finally, the appellant argues that the State's response to his petition did not provide the type of notice necessary to satisfy the requirements of due process. However, the State's response and amended response adequately set forth the procedural grounds upon which it relied and addressed the merits of the appellant's petition. Therefore, his argument is without merit.

For the above-stated reasons we affirm the circuit court's judgment.

AFFIRMED.

McMillan, P.J., and Cobb, Shaw, and Wise, JJ., concur.

APPENDIX "D"

RANDLE'S RULE 32 EXCERPTS

Randle's federal claims and the supported record cites are quoted from his Rule 32 Petition (C 11-43) in bold type hereinbelow:

In his pro se Petition Randle raised the following federal claims. C 11-24:

1. Counsel failed to seek a change of venue even though Randle's case, wherein he was accused of the murder of three white men, was highly publicized, and accordingly, he was denied a fair and impartial trial. C 10-12, R 215-274

2. Trial Counsel failed to pursue his objection to the jury venire which consisted of 60 potential jurors, but only seven blacks, to the point of a ruling thereon. R 49 Randle, an African American who was charged with the murder of three white men was severely prejudiced by a trial by jury consisting on 10 whites and 2 blacks. C 12

3. Trial Counsel failed to request and/or question the jury venire about racial bias. Record C 14

4. Trial Counsel failed to object to the trial court's failure to define each and every element of capital murder. C 13-14

5. Trial counsel failed to move to quash the indictment on the grounds that the indictment failed to meet the presentment requirement of *§ 15-8-70 of the Code of Alabama* C 15-16

6. Trial Counsel failed to subpoena and call witnesses to testify in the Petitioner's defense. C 16-17

7. Trial Counsel was ineffective when he failed to object to the trial court answering a question from the jury during its deliberations in the absence of himself and his counsel. C 17-18

8. Trial Counsel was ineffective on Direct Appeal when he failed to raise for appellate review Petitioner's objection to the trial court's Sua Sponte striking of a prospective juror. C 19-21

9. Trial Counsel was ineffective on Direct Appeal when he failed to raise for appellate review Petitioner's Batson objection. C 21-22

10. Trial Counsel rendered ineffective assistance when he failed to move to exclude the testimony of several state witnesses on the grounds of the State's late disclosure. C 22-23

11. Petitioner was denied effective assistance of counsel when his appellate counsel failed to raise for appellate review the adverse rulings on his motions for Judgment of Acquittal. C 23-24

In his Supplemental Petition filed by the undersigned counsel, Randle raised the following claims at C 25-43:

Rule 32.1(a) The constitution of the United States or of the State of Alabama requires a new trial, or a reversal.

1. Defendant, a black male accused of intentionally killing three white men was denied his Fourteenth Amendment right to equal protection and his Sixth Amendment right to a fair and impartial trial, as guaranteed by the Constitution of the United States and the Alabama Constiitution of 1901 in that he was tried by a jury consisting of only two black women, and no black males. Additionally, at least two of his jurors testified that they used the "N" word.

Additionally, in consideration of the racial facts in this case, Petitioner objected to a jury venire which consisted of only seven out of sixty potential jurors. The trial court responded thereto by deferring this objection, and then never ruling thereon. Additionally, the trial court removed Logan, a black female, from jury duty because of its erroneous belief that she was fifteen minutes late and that too much had transpired during her absence, when in fact the court opened at 9:10 a.m. and excused her at 9:15 a.m.; she was apparently out in the hall at the time she was excused; and very little had transpired during her absence. The Court denied Petitioner's Batson objection to the aforesaid removal of Logan from the jury venire.

Additionally, Juror Jefferson, also black, was excused by the trial court because she did not believe in the death penalty; however, other potential jurors expressing the same non-belief in the death penalty were not excused by the Court. Additionally, Jurors Lambert, Massey and Winton, all black,

were struck by the prosecutor because they had relatives who had been charged with crimes or they had been charged with crimes. The trial court denied Petitioner's Batson objection to these strikes.

Further, Petitioner was also denied equal protection through the racially selective interviews of witnesses at the crime scene, to wit: although several black witnesses gave statements regarding the alleged incident, Officer Eric Newby based his police report upon only three white witnesses Carlene Fedder, Mike Lanford and Jennifer Lewis. Race was so important to this case, that victims and Defendants were consistently referred to by racial designations in police reports and statements, with one witness even using the "N" word.

2. The Petitioner was denied his Sixth Amendment right to effective assistance of counsel for his defense during the trial, post judgment motions and his appeal, to wit:

> a. The Batson challenges were not addressed on appeal, and Petitioner hereby asserts that failure to address the same constitutes ineffective assistance of counsel in violation of his Sixth Amendment right to effective assistance of counsel.
>
> b. Pursuant to Alabama case law, evidence of the character or reputation of the deceased for turbulence, violence and blood thirstiness should be received when it illustrates or explains words or acts of the deceased at the time of the killing or to show that the killing was in self defense. In the instant case, two of the victims had a reputation and criminal convictions which supported such reputation, as evident in Petitioner's Exhibit 7 admitted at trial; Petitioner's counsel failed to present the aforesaid

evidence and argument to the jury, other than as said Exhibit; and he failed to request a jury charge on the same.

c. During the course of the trial, the Prosecutor asked Petitioner if he intended to kill each of the victims. Trial counsel failed to object to the Prosecutor's question as Invading the province of the jury in that it called for testimony on the ultimate fact to be decided by the jury. Moreover, trial counsel failed to attempt to rehabilitate Petitioner when he stated that he intended to shoot two of the victims, as part of his self defense. Petitioner was severely prejudiced by the aforesaid.

d. Trial counsel failed to poll the jury to ascertain if they each found that Petitioner had intended to kill the same two victims. In light of the trial court's jury instruction that "The jury must unanimously find that the defendant intentionally killed the same two alleged victims and that this was pursuant to one scheme or course of conduct to support a capital murder conviction" trial counsel was ineffective in failing to ascertain if each of the jurors found that Petitioner had intended to kill the same two victims, or to request a verdict form which provided said information.

3. Petitioner was denied his Sixth Amendment right to a fair and impartial trial; and his Fifth and Fourteenth Amendment rights to due process by the State suppressing evidence, misrepresenting evidence, or failing to provide critical exculpatory evidence, to wit:

a. The State failed to produce the many statements taken and/or recorded by police officers/investigators

at the scene of the incident. Said failure resulted in the State producing witnesses and their statements during the course of the trial, thereby making it impossible for Petitioner to present rebuttal testimony and expert witnesses. Said failure deprived Petitioner of his Fifth and Fourteenth Amendment rights to be informed of the nature and cause of the accusations, and to have compulsory process for obtaining witnesses in his favor. Said failure also severely prejudiced Petitioner in that many of the statements were exculpatory, or supportive of Petitioner's claim of self defense.

b. In response to the Court's question at a pretrial hearing on May 10, 2001, as to whether there were any statements by Petitioner and any motions to suppress the same, the State responded that there were no such statements, thereby severely prejudicing Petitioner by causing him not to file any motions to suppress statements. Thereafter, during his opening statement, the prosecutor told the jury that Petitioner had made the following statement prior to the shooting:

> That man [referring to Petitioner] picks up the clip off the ground, grabs the gun from Kenneth Allison and says, Fuck this shit, I'm going to kill some people.

The aforesaid statement was highly inflammatory and prejudicial to Petitioner.

c. In response to the Court's question at a pretrial hearing on May 10, 2001, as to whether there were any ballistics in order to determine whether Petitioner would present rebuttal thereto by experts, the prosecutor Said no. However, during the course of the

trial, the prosecutor presented ballistic evidence. Petitioner was severely prejudiced by such testimony in that he had no opportunity to present expert testimony in rebuttal thereto.

d. The prosecutor presented 3 or 4 tapes of recorded interviews and photographs, which he claimed to have received for the first time on May 9, 2001; however, the same prosecutor provided photographs and other discovery to the undersigned counsel, who at the time was counsel for Petitioner's co-defendant, Kenneth Allison, on September 13, 2000. A copy of the prosecutor's letter forwarding the same to me is attached hereto as Exhibit 1. Petitioner was not provided copies of the photographs until the week of June 8, 2001, and he was not provided summations of witness statements by William Fletcher and Jennifer Lewis until the Friday prior to the start of the trial the following Monday. Petitioner moved the Court for additional time to retain rebuttal experts to testify regarding bullet trajectories, however, said motion was denied. This last minute compliance with constitutional, statutory and case law was severely prejudicial to Petitioner.

e. Investigator Payne testified during the preliminary hearing that some of the witnesses interviewed stated that there were two sticks which Walter and Scotty had and were swinging. However, the Prosecutor failed to disclose these statements.

f. Officer Eric Newby wrote in his police report that:

There were three white males lying on ground being attended by citizens. One of the white males was wearing white short pants and no

> shirt. A large wooden club with tape around it was on the ground next to him. I observed a knife laying on the ground next to him and he appeared to have a second knife in the right front pocket of his pants.

What happened to the two knives? Apparently, these deadly weapons were suppressed. Additionally, Petitioner's trial counsel failed to produce evidence of the same, either because he was unaware that such evidence existed, or due to ineffective assistance of counsel.

> g. The nail(s) in the 2 X 4 had been removed by the time the jury saw the same, thereby negating a layperson/s readily discernable use as a deadly weapon. Such tampering with evidence is not only a violation of Petitioner's constitutionally protected rights to due process and to an impartial trial; it also constitutes the criminal offense of tampering with evidence, and it severely prejudiced him in his defense of self defense. Inasmuch as Petitioner's trial attorney failed to object to the altered evidence, Petitioner contends that he was ineffective as counsel.

> h. The box cutter and table leg were packaged together as Exhibit 60, although they were possessed by two different victims during the incident. Trial counsel failed to make the State's witnesses disclose to the jury which victims possessed these deadly weapons. Petitioner was severely prejudiced in his claim of self defense by not being able to show to the jury that each of the victims possessed deadly weapons at the time of the incident. Additionally, the State failed to disclose this exculpatory evidence, and indeed sought to hide it by admitting both weapons as one Exhibit.

4. Petitioner was denied a fair and impartial trial due to inflammatory and/or untrue comments made by the prosecutor in the presence of the jury, to wit:

> a. In his opening statement, the prosecutor compared the instant case to the McVeigh case and McVeigh's execution that very morning, to wit:
>
> Is there anyone on the panel who – of course, everyone is aware of the Timothy McVeigh Execution that took place this morning. In that case, 168 folks standing out there doing their job, kids in day-care. I think they were called collateral damage. Is there anyone on this jury panel who was opposed to the death penalty being imposed this morning? What if you just had three people that had been killed? Would that make a difference? Does that make you stop and think, well, hey, it's just three people, maybe we shouldn't impose the death penalty?

Such comparison was highly inflammatory and prejudicial to Petitioner. Moreover, the holding of this trial on the known date of the public execution of Timothy McVeigh was highly prejudicial to Petitioner.

Additionally, the Prosecutor stated through inference in his opening statement that Petitioner was the aggressor.

5. Petitioner was denied a fair and impartial trial due to the jury instruction given by the court which contained a sequential order for consideration of possible verdicts and the defense of self defense, thereby effectively depriving Petitioner of his defense of self defense as the jury deliberated on the charged offense and lesser included offenses. In fact, the

Court repeatedly gave the jurors the two components of capital murder and told them that if they found that Petitioner met both components that they just find that he is guilty of capital murder. The Court further told the jurors if they found that he was not guilty of capital murder, then they could consider the lesser included offenses, then his claim of self defense. Such instruction clearly precluded the jurors from considering his self defense claim as they deliberated the capital murder charge, which the Court delineated as their first act of deliberation. Petitioner was severely prejudiced by this jury instruction in that it completely deprived him of his defense of self defense. Further, inasmuch as trial counsel failed to object to said jury instruction, Petitioner hereby asserts that he rendered ineffective assistance, and that he was severely prejudiced thereby.

6. The verdict forms denied Petitioner his constitutionally protected right to a fair and impartial trial in that said forms did not permit the jury to render a verdict on his claim of self defense, nor to unanimously decide on which of the two victims it contended that Petitioner intentionally killed, as mandated by the trial court in its instructions.

Rule 32.1(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a post trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of due diligence;

(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted.

1. Petitioner was denied the testimony of a critical witness, Kenneth Allison, who was himself a criminal defendant at the time of the trial, and who was not called in order to protect his 5th Amendment rights. The capital murder charge against Allison was subsequently dismissed; accordingly, he is now available for trial. Allison's testimony will show that Petitioner acted in self defense.

2. The 911 emergency report shows that one of the victims (wearing white shorts) was outside wielding a stick and acting wild. Petitioner did not previously know about this exculpatory evidence.

3. Upon information and belief, sone of the State's witnesses were arrested, and threatened or accorded more lenient treatment in exchange for their testimony, thereby undermining the credibility of such testimony. For example, Fletcher was stopped by police ostensibly for a DUI, but was interrogated on the instant case. Suspiciously, William Fletcher was charged with possession of cocaine and felony DUI on 6/14/00; and Apostle Moore was charged with criminal trespass on 5/26/00. Petitioner intends to present further evidence of this assertion at the hearing on this Petition.

4. Corey Brown is a critical witness to Petitioner's claim of self defense in that he would testify that Petitioner started after one of the guys reached into his pants under his shirt and pulled something out, which appeared to be a gun to him;

and that he witnessed white guys chasing 5-6 black guys with bats, 2 X 4 and table leg; and that he witnessed Petitioner shoot over the heads of the white guys as they were approaching him. Mr. Brown would also testify that victims said to tell the black guys that daddy has a gun and he is going to use it. Mernell Sanderfer also stated that he told Investigators that it was self defense.

A new trial would permit Petitioner to present newly discovered evidence which was suppressed during his trial. Under the circumstances of this case it would be manifestly unjust to deny him a new trial. Petitioner requests a hearing on his Rule 32 Petitions.

III. Rule 32.1(f) The Petitioner failed to appeal within the prescribed time and his failure was without fault on the petitioner's part.

Petitioner failed to appeal the aforesaid issues within the prescribed time frames without fault on his part. In fact, many of said issues were not preserved for appellate review by trial counsel. Inasmuch as trial counsel also served as appellate counsel, this Petition affords Petitioner the first opportunity to raise such issues under ineffective assistance of counsel, albeit trial counsel repeatedly admitted his ineffectiveness due to inadequate time for preparation in his motions for continuance, his Petition for Mandamus, and in his appellate briefs. The record clearly shows that the trial court's denials of a continuance and the Prosecutor's continuous last minute mandatory disclosures rendered trial counsel ineffective on many of the issues.

Additionally, the State recognized Randle's aforesaid claims of ineffective assistance of counsel in its Response at C 46-47, to wit:

> I. Petitioner alleges that he was denied effective assistance of trial counsel in the following ways:
>
> a) Trial counsel failed to seek a change of venue based on the publicity surrounding the case.
>
> b) Trial counsel failed to move to quash the venire on the grounds that the venire failed to represent a fair cross section of the community.
>
> c) Trial counsel failed to request and/or question the jury during voir dire about racial bias.
>
> d) Trial counsel failed to object to the trial court's failure to define each element of the charge.
>
> e) Trial counsel failed to move to quash the indictment.
>
> f) Trial counsel failed to subpoena and call witnesses to testify.
>
> g) Trial counsel failed to object to the trial court's answering of jury questions posed during deliberation in the absence of the petitioner and trial counsel.

h) Trial counsel failed to move to exclude the testimony of several state witnesses on the grounds of late disclosure.

i) Trial counsel failed to introduce evidence of victims' reputation for violence.

j) Trial counsel failed to poll the jury to ascertain if each had found the Petitioner had intended to kill the same two victims.

k) Trial counsel failed to object to the sequential order of the jury instructions.

l) Trial counsel failed to object to the verdict forms.

ll. Petitioner alleges that he was denied effective assistance of appellate counsel in the following ways:

a) Appellate counsel failed to raise the issue on appellate review regarding the Petitioner's objection to the trial court's sua sponte striking of a prospective juror.

b) Appellate counsel failed to raise for appellate review the issue of the Petitioner's Batson objection.

c) Appellate counsel failed to raise for appellate review the issue of the Petitioner's Motion for Judgment of Acquittal.

Additionally, in its Memorandum Opinion at Appendix 3 the appellate court presented its summarization of Randle's Rule 32 Petition in eight claims, to wit:

CLAIM 1: His trial and appellate attorneys rendered ineffective assistance.

Claim 2: He was denied his right to equal protection and an impartial trial.

CLAIM 3: The State suppressed evidence, misrepresented evidence, or did not provide critical exculpatory evidence.

CLAIM 4: The prosecutor made inflammatory and/or untrue comments during the course of the trial.

CLAIM 5: The trial court's instruction on the order in which the jury should have considered the possible verdicts and his self-defense claim denied him a fair and impartial trial.

CLAIM 6: The verdict forms did not permit the jury to return a verdict on his claim of self-defense or to decide unanimously which two of the victims it found that he had intended to kill.

CLAIM 7: Newly discovered evidence exists that entitles him to a new trial.

Claim 8: He did not appeal through no fault of his own.

APPENDIX "E"

Jury Instructions

The trial court asked counsel what they wanted him to charge on. Trail/Appellant counsel responded: "Capital murder, murder, manslaughter." R 1023

During the trial court's discussion with counsel concerning jury instructions, Trial/Appellate counsel asked: "Judge, how will the court work in the self-defense instruction with respect to all of the charges? ... How does the Court intend to phrase that? That if they find that, that that is just a complete defense?" The trial court responded: "I will charge the jury if you find that the defendant acted in self-defense as to Charles Atchley, your verdict would be not guilty as to the charge concerning Charles Atchley, and same for the next two." Trial/Appellate counsel responded: "Fine." R 1029-1030

The trial court did not define the elements of one scheme or course of conduct during its jury instructions. R 1089-1091 The trial court instructed the jury:

> The jury must unanimously find that the defendant intentionally killed the same two alleged victims and that this was pursuant to one scheme or course of conduct to support a capital murder conviction..." R 1091

The trial court further gave the jury a sequential instruction, which permitted them to find Randall guilty of capital murder, or the lesser included offense without ever considering his defense of self defense, to wit:

> If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of the offense of intentional murder of two or more persons as charged, then you shall find the defendant guilty of capital murder...
>
> If you check the first box that says guilty of capital murder as alleged in the indictment, that would end your deliberations and you would not deliberate further. R 1092, 1093
>
> ... If you check the next box that says not guilty of capital murder as alleged in the indictment, you would continue with your deliberations as to each of the three alleged victims. And we have a verdict form that applies to each of the alleged victims. And just by way of example, there is one with respect to Walter Atchley, the same basic content with respect to Charles Atchley and the same basic content with respect to S.J. Atchley, Jr. but

your options would be guilty, intentional murder, Walter Atchley. If you decided that was not applicable based on the charges that I gave you and facts as you determine them to be, then you would next consider whether or not the defendant is guilty of manslaughter based on the charges that I will give you and the facts as you determine them to be. If that were not applicable, then you would consider the defense of the defendant or self-defense as to Walter Atchley. And if you found that the defendant acted in self-defense with respect to Walter Atchley or you found that the State had failed to meet it s burden of proof to prove that the defendant was guilty as to Walter Atchley beyond a reasonable doubt, then your verdict would be not guilty Walter Atchley. R 1093-1094

... So start with the capital murder charge first, and if you find taking into account my instruction of law and the facts as you determine them to be that the defendant is guilty beyond a reasonable doubt of capital murder as alleged in the indictment, then that would end your deliberations and you would go no further and you would mark the portion of this jury verdict form one with an X that says guilty of capital murder as alleged in the indictment. Your foreperson would sign in the place indicated. R 1116

Trial/Appellate Counsel did not object to any of the aforesaid jury instructions.. R 1120